STATE OF MICHIGAN

COURT OF APPEALS

CITY OF ECORSE, Plaintiff-Appellee,	UNPUBLISHED November 22, 2011
v	No. 299155 Wayne Circuit Court
LARRY B. SALISBURY, Defendant-Appellant.	LC No. 09-025446-CK

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant Larry Salisbury (Salisbury) appeals by right the circuit court's order denying his motion for summary disposition and granting summary disposition in favor of plaintiff city of Ecorse (the City). We affirm.

I

A

Salisbury served as the City's mayor between 2003 and 2007. In 1996, Joseph Dorr (Dorr) purchased a house next door to Salisbury's home. The house was in need of substantial repairs, which Dorr completed over the course of the next several years. Dorr decided to sell the house in 2003, but first needed to obtain a new certificate of occupancy from the City. To this end, Dorr made several requests for a certificate of occupancy. However, the City denied Dorr's repeated requests. Because he could not obtain a certificate of occupancy, Dorr was unable to sell his house. In November 2006, Dorr ultimately obtained a judgment from the Wayne Circuit Court ordering the City to issue him a new certificate of occupancy.

In August 2009, Dorr sued the City in federal court pursuant to 42 USC 1983. *Dorr v Ecorse*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 3, 2007 (Docket No. 05-73074). Dorr also sued Salisbury, both in his official capacity as mayor and in his individual capacity. Dorr alleged that the City and Salisbury (1) had effectively taken his private property without just compensation by denying his repeated requests for a certificate of occupancy and thereby preventing him from selling his house, and (2) had wrongfully denied his requests for a certificate of occupancy in violation of his substantive and procedural due-process rights. Among other things, Dorr argued that Salisbury had used his position as mayor to persuade certain city officials to deny his requests for

a certificate of occupancy, even though Dorr's house had passed all inspections and was otherwise entitled to a certificate.

Trial was held during January 2007, and the jury ultimately returned a verdict in favor of Dorr. The jury awarded Dorr damages against the City in the amount of $11,000, and against Salisbury (in his individual capacity) in the amount of $66,000. In May 2007, the United States District Court entered judgment consistent with the jury's verdict, confirming the jury's award of damages against the City and Salisbury. The court also awarded Dorr costs in the amount of $1,983 and attorney fees in the amount of $27,975, to be paid by the City and Salisbury jointly and severally.

In July 2007, the United States District Court stayed execution of the judgment pending appeal, provided that the City and Salisbury post a bond pursuant to Fed R Civ P 62(d). The City thereafter issued a check in the amount of $105,000, payable to the United States District Court as an appeal bond. On the memorandum line of the check was printed, "City of Ecorse & Larry Salisbury." It is not clear whether Salisbury was aware that the check had been issued.

On December 29, 2008, the United States Court of Appeals for the Sixth Circuit affirmed the decision and judgment of the United States District Court. *Dorr v Ecorse*, 305 Fed App'x 270 (CA 6, 2008). The United States District Court thereafter entered a stipulated order releasing the full amount of the appeal bond, plus $755 in additional costs, to Dorr in satisfaction of the judgment.

B

The City commenced the present action in the Wayne Circuit Court in October 2009, seeking to recover from Salisbury approximately $92,430. This amount represented the portion of the federal court judgment that the City had paid on Salisbury's behalf in addition to Salisbury's proportional share of the costs and attorney fees that had been ordered by the federal court. The City's complaint alleged that, by acquiescing in the posting of the appeal bond for both defendants, Salisbury had entered into an implied or constructive contract with the City for reimbursement. The complaint further alleged that Salisbury had breached this implied or constructive contract by failing to reimburse the City for that portion of the judgment paid on his behalf. Alternatively, the complaint alleged (1) that the City was entitled to common-law indemnification from Salisbury, (2) that Salisbury had breached a fiduciary duty to the City, (3) that the City was entitled to contribution from Salisbury, (4) that the City was entitled to exoneration, (5) that the City was entitled to recover the amounts paid on Salisbury's behalf under a theory of promissory estoppel, and (6) that Salisbury had been unjustly enriched by the City's payment of the judgment.

The parties filed cross-motions for summary disposition. Among other things, Salisbury argued that the City had failed to state any legally cognizable claims entitling it to relief. He asserted that he had never agreed to reimburse the City for the portion of the federal court judgment attributable to him and contended that he had never entered into any other contract or agreement with the City in this regard. In May 2010, Salisbury submitted the affidavit of Brunetta Brandy. Brandy averred that she had served as the Ecorse City Attorney between 2005 and 2007 and that the Ecorse City Council had "decided to indemnify Larry Salisbury for the

Judgment entered against him" during a "closed executive session" meeting on an undisclosed date.

It is undisputed that Salisbury did not timely respond to several of the City's discovery requests, including the City's requests for admissions. The City argued that, because Salisbury had not timely responded to its requests for admissions, all the facts required to prove the case were conclusively deemed admitted pursuant to MCR 2.312(B)(1).[1] The City also pointed out that Salisbury had submitted no other admissible documentary evidence to support his position. The City argued that the minutes of the Ecorse City Council meetings failed to substantiate the averments made by Brunetta Brandy. The City also argued that even if there had been independent evidence to support Brandy's averments, her affidavit was filed too late, it was self-serving and conclusory, and, at any rate, the Ecorse City Council would not have been authorized to "decid[e] to indemnify Larry Salisbury for the Judgment entered against him" during a closed meeting.[2] The City reiterated its position that Salisbury was legally obligated to reimburse it for the funds expended on his behalf and asserted that it was entitled to judgment as a matter of law.

In April 2010, Salisbury filed a motion seeking to submit late responses to the City's requests for admissions or to amend or withdraw his deemed admissions. Salisbury argued that it was within the circuit court's discretion to allow him to file late responses or to withdraw his deemed admissions and contended that late responses would not prejudice the City. Subsequently, in June 2010, Salisbury submitted an unsworn document that he referred to as an "affidavit," in which he attempted to explain why he had not timely responded to the City's requests for admissions and other discovery requests. In the document, Salisbury stated that he had tried to answer the City's interrogatories and requests for admissions, but that his fax machine had malfunctioned, his attorneys had been busy attending to other matters, and that he had been out of the country on business for approximately five weeks. He claimed that his failure to respond to the City's requests was merely inadvertent, that he had never agreed to release the bond posted by the City to satisfy the underlying federal court judgment, and that the City's new attorneys had agreed to do this entirely on their own.[3]

At oral argument, the circuit court questioned whether the averments contained in Brandy's affidavit were even relevant, observing that the Ecorse City Council would not have been authorized under the Open Meetings Act to make any final decisions concerning whether to

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[1] Among other things, Salisbury failed to timely respond to the City's requests to "admit that you knew you were individually liable on the Judgment against you" and to "admit that you owe the City reimbursement for your portion of the Judgment that was satisfied from the bond posted by the City."

[2] Pursuant to Michigan's Open Meetings Act, MCL 15.261 *et seq*., a public body such as a city council may not make "decisions" at a closed meeting. MCL 15.263(2); *Moore v Fennville Pub Schools Bd of Ed*, 223 Mich App 196, 200; 566 NW2d 31 (1997).

[3] The circuit court never actually decided Salisbury's motion to file late responses or to amend or withdraw his deemed admissions. Nonetheless, the court's ruling on the parties' cross-motions for summary disposition had the practical effect of denying Salisbury's motion.

indemnify Salisbury during a closed meeting. The circuit court then noted that a promise to pay the debts or obligations of another person is void under the statute of frauds unless it is in writing, MCL 566.132(1)(b), and that there was no writing by which the City had ever agreed to pay that portion of the federal court judgment attributable to Salisbury in this case. In the end, the circuit court found "no proof" that the City had ever agreed to indemnify Salisbury and noted that the underlying federal court judgment was "against [Salisbury] personally, not as mayor." The court ruled that Salisbury was legally obligated to repay the City for the bond funds it had posted and released on his behalf. Thereafter, the court issued an order denying Salisbury's motion for summary disposition, granting summary disposition in favor of the City, and entering judgment for the City in the amount of $92,340.38 plus costs and interest.

II

We review de novo the circuit court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The circuit court's decision to permit late responses to a party's requests for admissions is reviewed for an abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991).

III

The circuit court relied, at least in part, on Salisbury's deemed admissions as a basis for granting summary disposition in favor of the City. Requests for admissions are deemed admitted if unanswered, even if the requests themselves were objectionable. *Janczyk v Davis*, 125 Mich App 683, 689-690; 337 NW2d 272 (1983). By failing to timely respond to the City's requests to "admit that you knew you were individually liable on the Judgment against you" and to "admit that you owe the City reimbursement for your portion of the Judgment that was satisfied from the bond posted by the City," Salisbury was conclusively deemed to have admitted these facts. MCR 2.312(B)(1); *Hilgendorf v St John Hosp & Med Center*, 245 Mich App 670, 688-689; 630 NW2d 356 (2001). A deemed admission under MCR 2.312(B)(1) serves as a conclusive, formal concession. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996). Once facts are deemed admitted under MCR 2.312(B)(1), "'the opposing side need not introduce evidence to prove the facts.'" *Id*. (citation omitted).

By failing to timely respond to the City's requests for admissions, Salisbury conclusively admitted that he was liable to the City in this case. It is well settled that "the admissions resulting from a failure to answer a request for admissions may form the basis for summary disposition." *Medbury*, 190 Mich App at 556; see also *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991); *Janczyk*, 125 Mich App at 690. Moreover, Salisbury presented no other admissible documentary evidence in response to the City's motion for summary disposition, which was brought pursuant to MCR 2.116(C)(10). A party opposing a motion for summary disposition brought pursuant to subrule (C)(10) must affirmatively demonstrate the existence of a genuine issue of material fact. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). The opposing party may not rest upon mere denials, but must, by affidavits or other admissible evidence, "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Salisbury failed to do so.

We fully acknowledge that the circuit court never specifically decided Salisbury's motion to file late responses or to amend or withdraw his deemed admissions. Although "admissions resulting from a failure to answer a request for admissions may form the basis for summary disposition," *Medbury*, 190 Mich App at 556, "the failure to properly answer the requests for admissions does not mean that the trial judge must automatically enter summary judgment even if . . . the admissions cover the entire suit," *Janczyk*, 125 Mich App at 691. "The trial judge has the discretion to allow the party to file late answers or even to amend or withdraw the answers." *Id.*; see also MCR 2.312(D)(1).

However, even if the circuit court had formally denied Salisbury's motion, the court would not have abused its discretion. Salisbury's purported "affidavit" of June 2010, in which he attempted to explain why he had not responded to the City's requests for admissions, was not notarized and therefore did not qualify as an affidavit at all. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005). Moreover, even if the document had constituted a valid affidavit, the reasons provided therein for Salisbury's failure to respond to the City's requests for admissions were unpersuasive and insufficient and did not demonstrate the existence of "good cause." MCR 2.312(D)(1); see also *Janczyk*, 125 Mich App at 692-693.

By failing to respond to the City's requests for admissions, Salisbury conclusively conceded that he was liable to the City in the amount sought in the complaint. See *Radtke*, 453 Mich at 420. Furthermore, the reasons that Salisbury provided for failing to respond to the City's requests were insufficient to justify the granting of his motion to file late responses or to amend or withdraw his deemed admissions. All facts necessary to establish Salisbury's liability to the City were deemed admitted in this case and Salisbury otherwise failed to demonstrate the existence of a genuine factual dispute for trial. The circuit court properly denied Salisbury's motion for summary disposition and properly granted summary disposition in favor of the City.

Affirmed. As the prevailing party, the City may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell